

**MINUTES OF
ADVISORY COMMITTEE ON RULES OF EVIDENCE**

Friday, October 18, 2013

Arizona Courts Building

1501 W. Washington, Conference Room 230

Web Site: <http://www.azcourts.gov/rules/AdvisoryCommitteeonRulesofEvidence.aspx>

Members Present:

The Honorable Samuel Thumma, Co- Chair

The Honorable Mark Armstrong (Ret.), Co-
Chair

Mr. Paul Ahler (via telephone)

Professor Dave Cole (via telephone)

Mr. Timothy Eckstein

Mr. Milton Hathaway

The Honorable Paul Julien

Mr. William Klain

Mr. Carl Piccarreta (via telephone)

Ms. Patricia Refo (via telephone)

The Honorable James Soto

Members Not Present:

The Honorable George Anagnost

The Honorable Pamela Gates

Ms. Shirley McAuliffe

The Honorable Michael Miller

Quorum:

Yes

1. Call to Order—Judge Thumma

Judge Thumma called the meeting to order at 10:00 a.m., welcomed members, and thanked them for their participation on the committee.

2. Approval of Minutes from Meeting of April 19, 2013—Judge Thumma

The minutes were approved by acclamation.

3. Petition to Amend Rule 803(10) (R-12-0034)—Judge Armstrong

Judge Armstrong advised the committee that the Arizona Supreme Court approved the committee's petition at its August Rules Agenda. The amendment will take effect January 1, 2014. Judge Armstrong noted that the Court revised the proposed comment to the rule by deleting a portion of the comment without doing violence to the substance of the comment. Judge Armstrong reminded the committee that the Court views comments very cautiously.

Judge Armstrong further advised the committee that the proposed federal amendment of Rule 803(10) has been approved by the United States Supreme Court and delivered to Congress. Unless Congress affirmatively defers, modifies or rejects the amendment, it will become effective December 1, 2013.

4. Proposed Amendments to Fed. R. Evid. 801(d)(1)(B) and 803(6)—(8)—Judge Armstrong

The amendments proposed by the federal Advisory Committee on Evidence Rules, as modified after public comment, have been approved by the Standing Committee on Rules of Practice and Procedure. The next steps will be the Judicial Conference, United States Supreme Court and Congress. If the amendments are approved, as expected, they will become effective December 1, 2014. To recap, the proposed amendment to Rule 801(d)(1)(B)—defining certain prior consistent statements as not being hearsay—would provide that prior consistent statements are admissible as non-hearsay whenever they would otherwise be admissible to rehabilitate the witness's credibility. The other three proposals would amend Rules 803(6)-(8)—the hearsay exceptions for records, absence of business records, and public records—to eliminate an ambiguity uncovered during the federal restyling project and clarify that the opponent has the burden of showing that the proffered record is untrustworthy.

Judge Armstrong noted that the proposed federal amendments were modified by the Advisory Committee in response to public comment. The public comment on the proposed amendment to Rule 801(d)(1)(B) was sparse, but largely negative. The Advisory Committee found two concerns expressed in the public comment to be meritorious and to require an adjustment to the rule as issued for public comment. First, there was a concern that the phrase "otherwise rehabilitates the declarant's credibility as a witness" was vague and could lead to courts admitting prior consistent statements that have heretofore been excluded for any purpose—while that technically would not be possible because the proposal requires that a prior consistent statement must be admissible for rehabilitation under existing law in order to be admissible substantively, the expressed concern was that courts might somehow use the amendment as an

excuse to admit more prior consistent statements. Second, there was a more specific concern that the language could lead courts to admit prior consistent statements to rebut a charge that the witness had a motive to falsify, even though the statement was made *after* the motive to falsify arose. If that were so, it would mean that the Supreme Court's ruling in *Tome v. United States*, 513 U.S. 150 (1995), would be undermined, as the Court in that case held that admissibility of prior consistent statements under Rule 801(d)(1)(B) was limited to those consistent statements that were made *before* a motive to falsify arose.

In response to these concerns, the Advisory Committee proposed the following change to the amendment as proposed for public comment, which has been approved by the Standing Committee on Rules of Practice and Procedure (blacklined from the existing rule):

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; * * *

Judge Armstrong reminded the committee that the subcommittee chaired by Professor Cole previously recommended that the committee approve the proposed federal rule amendments if they are ultimately approved by the Supreme Court and Congress. Judge Armstrong also pointed out some considerations raised by Shirley McAuliffe with respect to the proposed change to Rule 801(d)(1)(B). Ms. McAuliffe stated the committee might want to wait to see how the rule plays out in the federal courts, particularly in light of the negative comments and the fact that the modified version has not been subjected to public comment. On the other hand, Ms. McAuliffe recognized that any Arizona proposal would have to go through the procedure prescribed by Rule 28, Rules of the Supreme Court.

Following discussion, the committee members present voted unanimously to file a petition to amend the Arizona Rules of Evidence to conform to the proposed federal amendments. The Arizona proposal would be made contingent upon final approval of the federal amendments. Judges Thumma and Armstrong agreed to draft a petition for the committee's consideration. The petition would be filed by January 10, 2014, and, if approved, would become effective January 1, 2015.

Finally, the committee discussed the content of comments to the proposed rules. The proposed federal notes are fairly lengthy. Judges Thumma and Armstrong will consider whether the proposed federal notes can be condensed while preserving the substance of the notes. If not, as suggested by Ms. Refo, the committee may want to either include the federal notes verbatim or incorporate them by reference. Judge Thumma noted that incorporation by reference would require readers of the rules to resort to other sources.

5. Ariz. R. Evid. 615 and Social Media—Judge Thumma, Bill Klain and All

The committee reviewed the final memorandum, dated June 11, 2013, which was sent to Justice Brutinel as chair of the Committee on the Impact of Wireless Mobile Technologies and Social Media on Court Proceedings. Judge Armstrong commended Mr. Klain on his draftsmanship of the memorandum.

Mr. Klain advised the committee that the memorandum includes two items for follow-up—items 1 and 4. Item #1 suggests consideration of “the inclusion of model admonition language in trial subpoenas if Rule 615 is invoked.” Mr. Klain agreed to refer this suggestion to the State Bar of Arizona for any further action deemed appropriate. Item #4 concerns whether to add a comment—including a model admonition—to Ariz. R. Evid. 611(a). The committee decided to defer this issue pending the results of the federal technology symposium held October 11, 2013, and the next edition of the civil and criminal benchbook, which may include a revised admonition. Ms. Refo volunteered to contact Professor Dan Capra, reporter to the federal Advisory Committee on Evidence Rules, to ascertain the results of the symposium.

6. California Evidence Code § 1109—Judge Thumma and All

Judge Thumma opened discussion of this provision of the California Evidence Code. This agenda item was referred to Judge Thumma for the committee’s consideration by Judge Suzanne Cohen. Section 1109 provides for the admissibility of certain other acts of domestic violence, child abuse and elder abuse. Mr. Ahler recommended that the committee further study this issue and indicated he would also refer the issue to APAAC for consideration. Judge Julien agreed that the committee should further study this issue and observed that Arizona has historically taken a lead in addressing domestic violence.

A subcommittee was created consisting of Mr. Eckstein, Mr. Ahler and Judge Julien, Chair. The subcommittee will further study this issue and report back to the committee as a whole, which took no position on the merits of the issue at this time.

7. Varying Evidentiary Standards in Subject-Matter Rules—Judge Thumma and All

Judge Thumma presented his memorandum regarding “Standards for Admissibility of Evidence in Arizona Subject Matter Procedural Rules.” Judge Thumma noted that several sets of subject matter procedural rules have modified the standard set forth in Ariz. R. Evid. 403. Although no decisions were made, the consensus of the committee was to further study this issue. A subcommittee was created consisting of Judges Anagnost [if he agrees to serve], Julien and Thumma. Judge Julien suggested starting with rules applicable to limited jurisdiction courts, which handle the vast majority of cases. The subcommittee will report back to the committee as a whole.

8. Other Items for Discussion—Judge Armstrong and All

Judge Armstrong read the following comment made in the minutes of the federal Advisory Committee on Evidence Rules from its May 3, 2013, meeting:

Judge Sutton noted that the Evidence Rules Committee proposed the least number of amendments of all the Rules Committees over the last 15 years. The Chair noted that the attitude of the Committee has always been that Evidence Rules are not to be amended unless there is a compelling reason, and the Committee continues its review of the rules on that principle.

Judge Armstrong referred the committee to the following link that was included in his October 3, 2013, e-mail to committee members:

[http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda Books/Evidence/EV2013-10.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2013-10.pdf). This document, entitled “Advisory Committee on Evidence Rules, Portland, ME October 11, 2013,” was prepared in contemplation of the Advisory Committee’s October 11 meeting and includes a comprehensive review of case law development after *Crawford v. Washington*, prepared by Professor Dan Capra, reporter to the federal Advisory Committee. The document also includes a memorandum by Professor Capra discussing the potential need for an amendment of Rule 803(16), the hearsay exception for ancient documents (documents “at least 20 years old”), in light of the proliferation of electronically stored information (“ESI”). Finally, the document includes an initial review by Professor Capra of whether amendment of the federal evidence rules would be required to accommodate case management and electronic case filing (“CM/ECF”). Professor Capra saw no imminent need for change but “noted that the Evidence Rules Committee is holding a symposium in October about the effect of technology on the Federal Rules of Evidence, and it may well be that the participants in that symposium will find other Evidence Rules that warrant amendment to accommodate technology.”

Judge Armstrong reported that the technology symposium was held on October 11, 2013, and that the proceedings will be published in the Fordham Law Review.

Judge Armstrong advised the committee that the federal Standing Committee on Rules of Practice and Procedure will be meeting January 9-10, 2014, in Phoenix. Ms. Refo stated there will be a public session on proposed changes to the civil rules.

Judge Armstrong reported that the Arizona Supreme Court entered an order on August 29, 2013, denying R-12-0012, the petition to amend Rule 412.

Finally, Mr. Klain advised the committee of R-13-0042, a petition to amend Ariz. R. Civ. P. 26(b)(4)(C), concerning expert compensation. The petition was filed in response to the court of appeals’ opinion in *Sanchez v. Gama*, 2013 WL 4430914 (Ariz. Ct. App. Div. 1 2013), in which the court also discussed Ariz. R. Evid. 702.

9. Future Meeting Schedule—Judge Armstrong

The committee set its next meeting on January 31, 2014, at 10:00 a.m. **[Following the meeting, Judge Armstrong also reserved the meeting room for meetings at the same time on April 11, September 12, and December 12, 2014.]**

10.-11. Call to the Public/Adjournment—Judge Thumma

Judge Thumma made a call to the public. No members of the public were present.

Following the call to the public, Judge Thumma adjourned the meeting at approximately 12:00 Noon.